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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934

No. 522

MANUFACTURERS' FINANCE COMPANY,
Petitioner,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy
of GRIGSBY-GRUNOW COMPANY,
Respondent.

ANSWER TO MOTION BY RESPONDENT FOR LEAVE TO PRESENT TO THE COURT A STATEMENT ALTERING ANSWER TO A QUESTION DIRECTED BY THE COURT TO COUNSEL FOR RESPONDENT DURING THE ORAL ARGUMENT, FEBRUARY 14, 1935.

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On oral argument, counsel for respondent was asked whether petitioner could have maintained an action at law for money had and received, against the receivers, and the question was answered in the affirmative. Several days after the oral argument was made counsel moved for leave to explain his answer.

In the written explanation respondent takes the position that on the day when the intervening petition was filed,

November 29, 1933, the receivers had, up to then, received an *inconsequential* sum of money from the assigned accounts and Record 14, lines 2 to 6, is cited to sustain this position. We submit that the record cited comes from a witness for the receivers who merely was called to justify an expenditure of $35,000.00 by the receivers for advertising and his testimony relating to collections is very general.

The amended stipulation of facts (R. 63, 64) reveals that the day following the appointment of the receivers a conference was had between the petitioner and counsel for respondent, at the time of which conference the receivers had collected $50,000.00 in cash on accounts receivable assigned to petitioner, and on the very day of the conference the receivers' representative was in Detroit endeavoring to collect an account of $100,000.00 from the Ford Motor Company which was assigned to petitioner, *and was then due.* It is not clear from the record whether the $100,000.00 was collected from the Ford Motor Company before the intervening petition was filed, but it is admitted that $50,000.00 had then been collected, which the receivers refused to turn over to petitioners. Evidently the parties expected that the $100,000.00 would be collected promptly and the record discloses that petitioner's counsel stated to the receivers that he would recommend to his client that if the receivers paid over the $50,000.00 on hand and the $100,000.00 to be collected immediately from the Ford Motor Company, that he (petitioner's counsel) would recommend that such payment be accepted and short term receivers' certificates be taken for the balance due intervening petitioner, which proposition the receivers refused to accept (R. 64). Three or four days later the intervening petition was filed (R. 13).

Theoretically, a remedy at law existed. In order to put this theory into practice, however, it would have been necessary to

(*a*) Procure the District Court to vacate the injunction restraining all persons from interfering with said receivers in possession of said property and in the administration of their trust and in the performance of their duties (R. 9).

(*b*) Obtain permission to sue the receivers at law.

(*c*) Notify debtors of the assignment of the accounts to petitioner, thereby incurring considerable expense, and possibly delaying the ultimate collection of the accounts.

To circumvent the possibility of petitioner overcoming these objections, the record discloses that the day following their appointment the receivers filed a petition in the District Court wherein they set forth under oath that under the terms of the contract in effect between petitioner and the Grigsby-Grunow Company, petitioners have the right to notify debtors under said accounts receivable, which debtors are distributors and dealers and said finance companies have the further right to send their representatives to the offices of the defendant corporation, at the expense of the defendant corporation, to check moneys received by the defendant corporation on said accounts receivable; that if said finance companies notified the debtors under said accounts receivable, so assigned, great loss would inure to the good will of the defendant corporation, or if said finance companies sent representatives to the offices of the defendant corporation to check up said accounts receivable, a large expense would be entailed by the defendant corporation (R. 11). The receivers prayed for an order authorizing them to turn over and deliver to petitioner such funds as may be received by the receivers from time to time upon accounts receivable owing to the defendant corporation which had theretofore been assigned to petitioner (R. 11). Thereupon the District Court

entered an order in accordance with the prayer of that petition (R. 12). On the trial petitioner called counsel for respondent (who was one of the receivers) as its witness (R. 27) and he testified that he did not know whether the foregoing order was entered or not, and concluded that if it was entered, it was never acted upon. Obviously, the attitude of the receivers toward the rights of petitioner and as to the effect of the contract has materially changed since this matter was tried in the District Court.

Respondent quotes from the intervening petition and contends that petitioner sought in advance of receipt by the receivers of moneys from assigned accounts, to obtain a decree to impress a trust on such funds. There are two prayers to the intervening petition, the second being the only one quoted by respondent. The first one, appearing at the bottom of page 15 of the record, says:

> "Wherefore, your petitioner prays that an order may be entered herein finding the title to the accounts so assigned to be vested in your petitioner and that your petitioner has the right, power, authority and duty to retain and keep said accounts so assigned, and may collect and enforce the collection of same, using all proper diligence, until the unpaid balance due to your petitioner, to be determined by this court, plus its service charges, attorney's fees, costs and expenses, as is provided in said contract, shall be paid and reimbursed to your petitioner."

Clearly, the petitioner was asking for an adjudication by the District Court holding that petitioner has the right and power to retain and keep the collections on the accounts so assigned until the unpaid balance due it has been paid in full.

If the respondent believed that petitioner possessed the theoretical remedies now suggested by him, some mention of these remedies would have been made in the answer and

the amendment to the answer filed by the receivers. But an examination of the answers disclose that the only defenses suggested were to the effect (R. 18) that in an effort to protect the entire amount of accounts receivable, including those assigned to petitioner, the receivers undertook to spend a large sum in advertising and other things which redounded to the benefit of the petitioner and that the contract involves merely a loan of money to the Grigsby-Grunow Company and that "no notice having been given to debtors of accounts, the barring order heretofore in this proceedings entered restrains said intervening petitioner from giving any notice upon such contracts; that the receivers can see no justification for equitable charge against them upon balances owing as of the date of receivership of an interest rate in excess of seven per cent."

What probably bothered the receivers was that if notice of the assignment of these accounts was given to the various debtors, who at that time by reason of the receivership of the Grigsby-Grunow Company were extremely worried, it would interfere with the good will of the company (R. 60). They were disturbed concerning the preservation of the *free* accounts and the equity in the pledged accounts and therefore urged the court to permit an expenditure of $35,000.00 for advertising, as recited in their petition (R. 56-60). A similar contention was made by the receiver in the matter of Lutz & Schramm, 38 A. B. R. 351, and there the court stated:

> "The collection of the accounts by them (receivers) was for the benefit of the bankrupt estate so as not to interfere with the preservation of the good will."

Respectfully submitted,

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